



Extra Legal

Bringing Noncitizens Out of the Shadows: Recognizing Padilla's Retroactivity

*By Yangchen Tenzin Nangpa**

Jose Padilla, a Honduran immigrant, had been a legal permanent resident (“LPR” or green card holder) for nearly forty years until being arrested on drug charges.¹ Because he was a legal resident for so long, his criminal defense attorney told him that he did not have to worry about his immigration status. Relying on this erroneous advice, Padilla pleaded guilty to the transportation of marijuana.² He became subject to mandatory deportation as a result of his guilty plea.³

Recognizing that this was serious infringement of a constitutional right, the Supreme Court ruled in *Padilla v. Kentucky* that the Sixth Amendment requires criminal defense counsel to advise noncitizen⁴

* Candidate for Juris Doctor, 2016, Northeastern University School of Law.

¹ *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010).

² *Id.* at 359–60.

³ *Id.*

⁴ For the purposes of this paper, noncitizens include individuals who are not U.S. citizens by birth or naturalization but are present in the U.S. A noncitizen could be someone who is undocumented (unlawfully present) or someone who is a legal permanent resident.

clients about immigration consequences of a guilty plea.⁵ The Court held that, absent such evidence, noncitizens could seek to vacate a guilty plea by raising ineffective assistance of counsel claims (“*Padilla* claims”).⁶ This landmark decision not only transformed the practice of noncitizen criminal defense, it also provided a great deal of hope to noncitizens whose convictions pre-dated *Padilla*.⁷ However, their hopes diminished when, three years after the decision, the Supreme Court, in *Chaidez v. United States*, ruled that *Padilla* has no retroactive effect.⁸ Specifically, the Court ruled that *Padilla* imposed a “new obligation” or a “new duty” on criminal defense attorneys to inform clients of collateral consequences of convictions, including deportation.⁹ The *Chaidez* Court simply set a floor for the retroactive effect of *Padilla*, allowing states to provide a broader remedy for constitutional violations by holding *Padilla* retroactive.¹⁰

The *Chaidez* decision certainly did not end *Padilla*’s retroactivity debate.¹¹ Although state courts could recognize *Padilla*’s retroactivity as a matter of state habeas law, a majority of states have declined to do so by following the *Chaidez* ruling.¹² Some states are still debating *Padilla*’s retroactivity while the highest courts in Massachusetts, New Mexico, and

⁵ *Padilla*, 559 U.S. at 373.

⁶ *Id.*

⁷ Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 175 (2011).

⁸ *Chaidez v. United States*, 133 S. Ct. 1103, 1104–05 (2013).

⁹ *Id.* at 1105 n.9, 1110.

¹⁰ Danielle R. Acker Susanj, *Retroactivity, Strickland, and Alien Criminal Defendants: How the Chaidez Decision Raised More Questions Than It Answered*, 162 U. PA. L. REV. 55, 70 (2013) (citing *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (holding that state courts may apply “new” rules of criminal procedure retroactively, even if federal courts may not)).

¹¹ *Id.* at 56.

¹² Kate Lebeau, *Padilla Retroactivity on State Law Grounds*, 94 B.U. L. REV. 1651, 1653 (2014) (citing *Chaidez*, 133 S. Ct. at 1107 n.2).

Washington have boldly diverged from *Chaidez* and recognized *Padilla's* retroactivity on state law grounds.¹³ Although the Supreme Court held, in *Boykin v. Alabama* that a defendant's guilty plea is constitutionally valid *only* when the defendant "voluntarily and understandingly" enters a plea of guilty,¹⁴ there could be many pre-*Padilla* guilty pleas that do not meet this standard. For many noncitizens, vacating constitutionally defective guilty pleas is the only path to legal residency or discretionary relief from deportation because immigration laws impose severe consequences for noncitizens with criminal convictions.¹⁵

This issue is particularly pressing today considering President Obama's recent Executive Order to expand Deferred Action for Childhood Arrivals (DACA) and to create the new Deferred Action for Parental Accountability (DAPA) program.¹⁶ The Department of Homeland Security estimates that roughly 4.9 million noncitizens may be eligible for these initiatives.¹⁷ However, as with many discretionary forms of immigration relief,¹⁸ noncitizens with criminal records are barred from

¹³ *Ramirez v. State*, 333 P.3d 240, 243 (N.M. 2014); *Commonwealth v. Sylvain*, 995 N.E.2d 760, 771 (Mass. 2013); *In re Yung-Cheng Tsai*, No. 88770-5, 2015 WL 2164187, at *4 (Wash. May 7, 2015).

¹⁴ *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).

¹⁵ *See Lebeaux*, *supra* note 12, at 1656.

¹⁶ *See* Press Release, The White House, Remarks by the President to the Nation on Immigration (Nov. 20, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (stating that DAPA hopes to bring noncitizens "out of the shadows [to] get right with the law"); Press Release, Dep't of Homeland Sec., Executive Actions on Immigration (Feb. 17, 2015), *available at* <http://www.uscis.gov/immigrationaction>. Twenty-six states have sued to stop the implementation of this executive action. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015) (declining to stay preliminary injunction barring implementation of DACA and DAPA, pending appeal).

¹⁷ Press Release, Dep't of Homeland Sec., *supra* note 16.

¹⁸ *See, e.g.*, 8 U.S.C. §§ 1158 (2009) (Asylum), 1229(b)(b) (2006) (Cancellation of Removal for Non-Lawful Permanent Residents), 1229b(a) (2008) (Cancellation of Removal for Lawful Permanent Residents), 1229c (2006) (Voluntary Departure), 1231(b)(3) (2006) (Withholding of Removal), & 1255(a) (2008) (Adjustment of Status).

participation in DAPA.¹⁹

In light of these issues, this article will evaluate current federal and state policies dealing with the noncitizen population and, based on these evaluations, will lay out five rationales as to why states should hold *Padilla* retroactive. Together, these policy and fairness considerations show that states have a legitimate interest in recognizing *Padilla's* retroactivity and in affording noncitizens the opportunity to challenge constitutionally deficient pre-*Padilla* guilty pleas.

I. Background: *Padilla* in “Crimmigration”²⁰ Context

In order to fathom the significance of the *Padilla* retroactivity issue, one must first understand how criminal convictions are treated within immigration law. Both citizens and noncitizens run afoul of the law. However, a noncitizen's experience of the criminal justice system is distinct from that of a citizen.²¹ Noncitizen defendants not only face serious cultural and language barriers during their criminal proceedings, but they also face the devastating consequence of deportation.²²

¹⁹ See Memorandum from Jeh Charles Johnson, Dir., Dep't of Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (setting out factors that make certain removable immigrants a priority target for arrest and removal); *see also* Press Release, The White House, FACT SHEET: Immigration Accountability Executive Action (Nov. 20, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> (stating “DHS will also create a new deferred action program for people who are parents of U.S. Citizens or Lawful Permanent Residents (LPRs) and have lived in the United States for five years or longer if they register, pass a background check and pay taxes.”).

²⁰ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (referring to the criminalization of immigration law as “crimmigration”).

²¹ Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1180 (2013).

²² Brief for Amici Curiae Asian American Justice Center, Mexican American Legal Defense & Education Fund, & Other Immigrants' Rights Organizations at 4, *Padilla v.*

Deportable offenses include crimes involving moral turpitude, controlled substance offenses, aggravated felonies, as well as an extensive list of other crimes.²³ The vast majority of convictions – especially for minor offenses – result from guilty pleas.²⁴ Many noncitizens plead guilty without any understanding that the resulting conviction could land them in deportation proceedings and ultimately bar their eligibility for various forms of discretionary relief like asylum, cancellation of removal, temporary protection status, DACA, or DAPA.²⁵

Recognizing “the stakes of a noncitizen’s criminal conviction” and “the importance of accurate legal advice for noncitizens accused of crimes,” the Supreme Court declared in *Padilla* that the Sixth Amendment requires criminal defense counsel to advise their noncitizen criminal clients of potential immigration consequences related to pleading guilty.²⁶ Although the decision did not explicitly state that it applied retroactively, the majority opinion indicated:

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation

Kentucky, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1567358, at *16; 8 USC § 1227 (2008).

²³ 8 U.S.C. § 1227(a).

²⁴ See HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY (2010), available at http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (finding that 99.6% of misdemeanor convictions in New York City are guilty pleas).

²⁵ COMM. FOR PUB. COUNSEL SERVS. IMMIGRATION IMPACT UNIT, IMMIGRATION CONSEQUENCES OF MASSACHUSETTS CRIMINAL CONVICTIONS 6–8 (2012), available at http://www.nationalimmigrationproject.org/legalresources/cd_so_Chart%20-%20Massachusetts%20Offenses%20-%20updated%20August%202012.pdf; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1776 (2013) (“[N]oncitizens commonly plead guilty to petty offenses without knowing that deportation ... will result.”).

²⁶ *Padilla*, 559 U.S. at 363.

on counsel to provide advice on the deportation consequences of a client's plea.²⁷

Unfortunately, the majority in *Chaidez* turned a blind eye to this rationale.²⁸

In 2012, the five states with the most immigrants as a portion of their populations were California (26.9%), New York (22.3%), New Jersey (21.6%), Florida (19.4%), and Nevada (19.0%).²⁹ Except for California,³⁰ *Padilla* does not apply retroactively in any of these states.³¹ It is disconcerting that despite harsh and serious constitutional violations and equitable justifications for protecting the rights of noncitizens, these immigrant-populated states have failed to afford the right to claim ineffective assistance of counsel for noncitizens who have pre-*Padilla* convictions.

II. States Should Recognize *Padilla's* Retroactivity

a. *Chaidez* Was Wrongly Decided – *Padilla* Did Not Announce a New Rule

Long before *Padilla*, the Supreme Court recognized that the Sixth Amendment right to counsel includes the right to effective assistance of

²⁷ *Id.* at 372.

²⁸ *Chaidez v. United States*, 133 S. Ct. 1103, 1119 (2013) (Sotomayor, J., dissenting) (contending that the majority is undermining its reasoning from *Padilla*).

²⁹ *Migration Population by State, 1990 – Present*, MIGRATION POLICY INST., <http://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present?width=1000&height=850&iframe=true> (last visited July 13, 2015).

³⁰ See MICHAEL K. MEHR, IMMIGRANT LEGAL RES. CTR., POST-CONVICTION RELIEF IN CALIFORNIA SHOULD BE UNAFFECTED BY *CHAIDEZ V. UNITED STATES* (Apr. 2011), available at http://www.ilrc.org/files/documents/ilrc-pcr_in_calif_not_affected_by_chaidez_march_2013.pdf (citing *People v. Soriano*, 240 Cal. Rptr. 328, 333–34 (Cal. Ct. App. 1984)).

³¹ See *People v. Baret*, 16 N.E.3d 1216 (N.Y. 2014); *Hernandez v. State*, 61 So. 3d 1144, 1145 (Fla. Dist. Ct. App. 2011); *State v. Gaitan*, 37 A.3d 1089 (N.J. 2012).

counsel.³² Also, the Court held that all guilty pleas must be made “voluntarily and understandingly.”³³ The Court has never held that the Sixth Amendment right to effective assistance of counsel depends on citizenship status.³⁴ Taking these facts into consideration, the Court’s decision in *Chaidez* declaring *Padilla* a “new rule”³⁵ is faulty.

The Court in *Padilla* cited a long list of practice guides and professional responsibility manuals to support the ruling that the “prevailing professional norms support[] the view that counsel must advise her client regarding the risk of deportation.”³⁶ Almost all states have adopted the American Bar Association’s Model Rules of Professional Conduct,³⁷ under which lawyers, as part of providing “competent representation to a client,”³⁸ must “maintain the requisite knowledge and skill [by] keep[ing] abreast of changes in the law and its practice.”³⁹ By

³² *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *see also* *Reece v. Georgia*, 350 U.S. 85, 90 (1955).

³³ *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

³⁴ *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”) (internal citations omitted); *see also* *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (“It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’ ... Our longstanding Sixth Amendment precedents, the seriousness of deportation [, and the] impact of deportation on families ... demand no less.”) (internal citation omitted).

³⁵ *Chaidez v. United States*, 133 S. Ct. 1103, 1111 (2013) (“*Padilla* thus announced a ‘new rule.’”).

³⁶ *Padilla*, 559 U.S. at 367.

³⁷ Am. Bar Ass’n, *Alphabetical List of States Adopting Model Rules*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited July 21, 2015).

³⁸ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2014), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.

³⁹ Model Rules of Prof’l Conduct R. 1.1 cmt. 8 (2014), *available at*

proclaiming that *Padilla* created a new rule, the Court in *Chaidez* not only suggested that prior to *Padilla*, defense attorneys had no duty to provide effective assistance to noncitizen criminal defendants, but it also neglected lawyers' longstanding ethical responsibilities to provide competent representation.

Justice Ginsburg joined in Justice Sotomayor's dissent in *Chaidez*, indicating that the Court had undermined the very spirit of *Padilla*'s reach by failing to apply it retroactively.⁴⁰ Speaking to the substance of the retroactivity rule, the dissenting Justices indicated that the majority's decision "deprive[d] defendants of the fundamental protection of *Strickland*, which requires the lawyers to comply with professional norms with respect to any advice they provide to clients."⁴¹ Based on the underlying rationales, the Court in *Chaidez* improperly declared *Padilla* a new rule.

b. Holding *Padilla* Retroactive is Not Amnesty

Holding *Padilla* retroactive does not automatically provide relief to noncitizen defendants from their pre-*Padilla* convictions. It simply provides them an opportunity to challenge the constitutionality of their convictions.⁴² Like any other post-conviction relief, noncitizens asserting *Padilla* claims must overcome the procedural limitations inherent in those remedies. Many states have strict statutes of limitations and impose custody requirements in order for individuals to seek post-conviction

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html.

⁴⁰ *Chaidez*, 133 S. Ct. at 1121.

⁴¹ *Id.* at 1120–21.

⁴² *Padilla v. Kentucky*, 559 U.S. 356, 372–73 (2010). *Padilla* claims can form the substantive basis of a habeas corpus petition. Although habeas petitions usually do not overturn convictions, a successful challenge to the constitutionality of a conviction obtained through a guilty plea would allow the defendant to enter a new "not guilty" plea and proceed to trial.

relief; as a result *Padilla*-related claims often fail on procedural grounds.⁴³

A greater challenge is that noncitizens asserting *Padilla* claims must establish ineffective assistance of counsel through the two-prong test from *Strickland v. Washington*, which requires that (1) the quality of the attorney's representation falls below professional norms (deficient performance); and (2) the defendant suffers prejudice as a result of the deficient performance (prejudice).⁴⁴ In order to prove prejudice, defendants who had "voluntarily" pled guilty must demonstrate that but for incompetent and ineffective lawyering, they would not have done so. This "different outcome inquiry"⁴⁵ undercuts *Padilla*'s reach because courts are highly reluctant to deem generic warnings of immigration consequences during plea-bargaining process as prejudice.⁴⁶

Successfully effectuating a *Padilla* claim would not afford a complete victory to noncitizen defendants because prosecutors can still choose to re-prosecute the same offenses.⁴⁷ Therefore, holding *Padilla* retroactive grants no amnesty to noncitizens, but merely provides them

⁴³ See, e.g., *Marte v. United States*, 952 F. Supp. 2d 537, 540 (S.D.N.Y. 2013) (habeas corpus petition denied because noncitizen petitioner failed to satisfy custody requirement); *Smith v. Warden of Essex*, 902 F. Supp. 2d 524, 532 (D.N.J. 2012) (recognizing ineffective assistance of counsel, but holding petitioner was not in custody); *Guerra v. State*, 89 A.3d 1028, 1033–34 (Conn. 2014) (relief denied for failure to file before sentence fully served); *People v. Villa*, 202 P.3d 427, 430, 434 (Cal. 2009) (post-conviction immigration detention may not satisfy custody requirement).

⁴⁴ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁴⁵ Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 700 (2011) (internal quotation marks omitted).

⁴⁶ Rachel E. Rosenbloom, *Will Padilla Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 332 (2011); see, e.g., *Commonwealth v. Martinez*, 85 Mass. App. Ct. 1126, 1127 (2014) (unpublished) (denying noncitizen's motion for new trial because he failed to demonstrate prejudice, despite contending that he would not have admitted to sufficient facts to sustain the offense had his attorney advised him of this admission's immigration consequences).

⁴⁷ Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653–54 n.13 (2013) ("[T]he government could decline to re-prosecute Padilla on remand, although this seems unlikely.").

the opportunity to challenge defective guilty pleas.

c. *Padilla's* Retroactivity Is Necessary for Noncitizens with Minor Criminal Offenses

A staggering number of deportations result from convictions for minor crimes.⁴⁸ According to U.S. Immigration and Customs Enforcement (ICE), in 2014, eighty-five percent of deported individuals were convicted of a crime.⁴⁹ Some of the most common crimes resulting in deportation included marijuana possession and traffic offenses.⁵⁰ Even though President Obama has publicly stated that immigration enforcement would focus on dangerous or depraved criminals,⁵¹ nearly two-thirds of the two million people deported under his administration have been removed for these types of minor infractions.⁵² In light of this mass deportation of noncitizens convicted of minor non-dangerous crimes, states should take into consideration how these practices affect states' own socio-political and economic spheres.

One of the underlying concerns of deportation is disintegration of families, particularly when parents of U.S. citizen or LPR children are deported due to minor offenses. In 2013, 72,410 deported individuals reported having one or more U.S.-born children.⁵³ Unquestionably,

⁴⁸ See Alison Parker & Brian Root, *Forced Apart (By the Numbers)*, HUMAN RIGHTS WATCH (Apr. 2009), https://www.hrw.org/sites/default/files/reports/us0409webwcover_0.pdf.

⁴⁹ *FY 2014 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/removal-statistics/> (last visited July 21, 2015).

⁵⁰ Parker & Root, *supra* note 48.

⁵¹ Press Release, The White House, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

⁵² Charlotte Alter, *Most Immigrants Deported Under Obama Had Thin or No Criminal Record*, TIME MAG. (Apr. 7, 2014), <http://time.com/51518/obama-deportations-immigration/>.

⁵³ Guillermo Cantor, *Thousands of U.S.-citizen Children Separated from Parents, ICE Records Show*, IMMIGR. IMPACT, (June 26, 2014),

deporting these parents comes with a cost both to their children and to the state. Children not only face the devastating emotional turmoil of separation from their loved ones, but many also become wards of the state.⁵⁴ In 2011, at least 5,100 children whose parents had been detained or deported were in foster care in the U.S.⁵⁵ More than 15,000 children may face a similar fate in the next five years if our flawed deportation policy remains intact.⁵⁶ The policy of deporting parents for minor offenses is counterintuitive given that these deportees are likely going to attempt reentering the U.S. in order to reunite with their children.⁵⁷ Therefore, *Padilla* retroactivity will protect states and their noncitizen populations from the psychological and financial consequences of deportation.

d. Noncitizens Who May Seek Pre-*Padilla* Claims in Order to Apply for Discretionary Relief (like DAPA or DACA) Are Unlikely to Leave the U.S.

States have great economic incentives to recognize *Padilla*'s retroactivity, particularly for those noncitizens who qualify for DAPA relief.⁵⁸ One of the eligibility requirements for DAPA is that the

<http://immigrationimpact.com/2014/06/26/thousands-of-u-s-citizen-children-separated-from-parents-ice-records-show/#sthash.0TryVrob.dpuf>.

⁵⁴ *Id.*

⁵⁵ *Shattered Families*, RACE FORWARD (Nov. 2, 2011), <https://www.raceforward.org/research/reports/shattered-families>.

⁵⁶ *Id.*

⁵⁷ See Peter A. Schulkin, *The Revolving Door Deportations of Criminal Illegal Immigrants*, CTR. FOR IMMIGR. STUD. (Nov. 2012), <http://cis.org/sites/cis.org/files/schulkin-revolving-door-11-12.pdf> (“Out of the 188,382 criminal aliens deported in 2011, at least 86,699, or 46 percent, had been deported earlier and had illegally returned to the United States.”).

⁵⁸ For a noncitizen to be eligible for DAPA, he or she must be the parent of a U.S. citizen or lawful permanent resident; have continuously lived in the U.S. since January 1, 2010; have been present in the U.S. on November 20, 2014; not have lawful immigration status on November 20, 2014; have not been convicted of certain criminal offenses including all felonies and some misdemeanors; present no other factors that would render a grant of deferred action inappropriate; and pass a background check. AM. IMMIGRATION COUNCIL, A GUIDE TO THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION (Nov. 2014), *available at*

noncitizen must have a U.S. citizen or LPR child.⁵⁹ Noncitizens who qualify to participate in the DAPA program may chose to remain in this country whether they have status or not. Some are likely to have lived here for a long time and become deeply embedded within their local communities, especially if they have U.S. citizen or LPR children here.⁶⁰ It is likely that many work to provide for their families, but do so under the shadow of the law.⁶¹ States have great incentives to bring them out of the shadows so that they can “get right with the law”⁶² and contribute to the states’ overall economy and polity. Recognizing *Padilla’s* retroactivity would potentially afford noncitizens the required status to work and to subsequently contribute to their states.

e. States Are Sending Conflicting Messages to Noncitizen Populations by Not Recognizing *Padilla’s* Retroactivity.

As of 2013, New York had one of the country’s largest immigrant populations,⁶³ yet the state’s highest court decided in *People v. Baret* that *Padilla* does not apply retroactively.⁶⁴ In *Baret*, dissenting Justice Rivera stated that the court “must decide whether retroactive application of *Padilla* serves the state’s interest.” By not recognizing *Padilla’s* retroactivity, the majority not only ignored the practical reality of New York’s demographics, but it also failed to take into account the state’s interest in protecting the rights of noncitizens.

http://www.immigrationpolicy.org/sites/default/files/docs/a_guide_to_the_immigration_accountability_executive_action_final.pdf.

⁵⁹ Press Release, Dep’t of Homeland Sec., *supra* note 16.

⁶⁰ *See, e.g.*, Ramirez v. State, 333 P.3d 240, 242 (N.M. 2014).

⁶¹ Press Release, The White House, *supra* note 51.

⁶² *Id.*

⁶³ MIGRATION POLICY INST., *supra* note 29.

⁶⁴ 16 N.E.3d 1216 (N.Y. 2014) (echoing the Supreme Court’s holding in *Chaidez* and ruling that *Padilla* imposed a new rule and thus does not apply to convictions that predate the decision).

There is growing support for integration of the noncitizen population into New York's socio-political and economic sphere. For instance, New York is one of the few states that grants in-state tuition rates to undocumented students enrolled in state colleges and universities.⁶⁵ Today, some states, including Massachusetts, grant in-state tuition rates to DACA recipients based on the notion that these noncitizens have "real and substantive ties" to the community.⁶⁶ The proponents of such legislation not only point to noncitizens' long-term community ties, but also consider the "likelihood that they will remain within the United States [and are] in the best position to contribute to their local communities – economically and civically."⁶⁷ These kinds of measures demonstrate states' interests in bringing noncitizens out of the shadows, particularly noncitizens who are most likely to remain here, irrespective of the harsh reality of living in the United States without any immigration status.

Recently, New York City mayor Bill de Blasio announced IDNYC, which gives identification cards to all New York City residents, including vulnerable individuals like undocumented immigrants and others who have difficulties obtaining government-issued identification.⁶⁸ Proponents

⁶⁵ *Deferred Action for Childhood Arrivals: Federal Policy and Examples of State Actions*, NAT'L CONFERENCE OF STATE LEGISLATURES, (Nov. 18, 2014), <http://www.ncsl.org/research/immigration/deferred-action.aspx>.

⁶⁶ Angela M. Banks, *Members Only: Undocumented Students & In-State Tuition*, 2013 B.Y.U. L. REV. 1425, 1433–34 (2013); see Richard Pérez-Peña, *Immigrants to Pay Tuition at Rate Set for Residents*, N.Y. TIMES, (Nov. 19, 2012), http://www.nytimes.com/2012/11/20/us/illegal-immigrants-to-pay-in-state-tuition-at-mass-state-colleges.html?_r=0.

⁶⁷ Banks, *supra* note 68, at 1433.

⁶⁸ *Mayor Bill de Blasio and Council Speaker Melissa Mark-Viverito Launch IDNYC, the Country's Most Ambitious Municipal Identification Program*, CITY OF NEW YORK (Jan. 12, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/021-15/mayor-bill-de-blasio-council-speaker-melissa-mark-viverito-launch-idnyc-country-s-most/#/0> ("For too long, undocumented New Yorkers, the homeless, foster youth, and the elderly have been barred from or faced difficulty obtaining personal identification.").

of the program called it “a lifeline out of the shadows”⁶⁹ and “an affirmation that if you live here, if you pay taxes and if you send your kids to school here, you are a New Yorker.”⁷⁰

These programs and initiatives reflect New York’s objective of bringing immigrant communities out of the underground workforce into the formal economy and civic circle. By not recognizing *Padilla’s* retroactive effect, the state has adopted a measure that is in conflict with its own interests. Therefore, states like New York should reconsider their decisions and send consistent and uniform messages to their noncitizen population by holding *Padilla* retroactive.

III. Conclusion

It is undeniable that deportation resulting from unconstitutional convictions raises fundamental questions of fairness, yet a large majority of states has failed to realize such equity. The policy and fairness arguments made in this article illustrate the importance of affording noncitizens the opportunity to challenge their constitutionally deficient guilty pleas. States have a significant and legitimate interest in recognizing *Padilla’s* retroactivity for noncitizens with pre-*Padilla* convictions because they generally have lived in the U.S. for a long period and have strong ties to the community. Bringing these noncitizens out of the shadows and out of the underground workforce can contribute greatly to states’ overall economies and to civil society as a whole.

⁶⁹ *Id.*

⁷⁰ Jillian Jorgensen, *Bill de Blasio Launches IDNYC, New York City’s Municipal I.D. Program*, OBSERVER NEWS (Jan. 12, 2015, 1:56 PM), <http://observer.com/2015/01/bill-de-blasio-launches-idnyc-new-york-citys-municipal-i-d-program/>.
